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1 there simply is none. And aside from the fact that the bids  
2 aren't even due until October 30, the pre-bidding, that won't  
3 take place until September 30, so they have no risk of  
4 irreparable harm. There is no urgency.

5 THE COURT: Well, September 30 is not that far away.

6 I question in my mind why, since they have known about  
7 this for months, they waited until Rosh Hashanah to do  
8 something about it, but it is a well known trick.

9 MR. ROTHMAN: Exactly. And, your Honor, the only  
10 statement that they rely on in this letter is pure hearsay  
11 about how the parties have supposedly been working together,  
12 and it doesn't establish anything.

13 So let me turn now briefly to forum non conveniens,  
14 because I think that the facts which support dismissal on forum  
15 non conveniens grounds are so glaring that the Court should, if  
16 it needs to, dismiss this sua sponte.

17 As the Court may be aware, the leading case in the  
18 Second Circuit is Iragorri v. United Technologies. It was an  
19 en banc decision and the cite was 274 F.3d, 65. A recent  
20 application and interpretation of that decision was set forth  
21 in Judge Castel's opinion last summer of 2006 in Gilstrap v.  
22 Radiance, 443 F.Supp.2d 474. That has been affirmed by the  
23 Second Circuit. We were involved in that case, which is the  
24 only reason why the law is fresh in my mind, your Honor. This  
25 is not my usual --

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1 THE COURT: You were not showing off? Come on.

2 MR. ROTHMAN: Here is the situation as to forum non  
3 conveniens because I think that it is very clear.

4 In the Second Circuit there is a three-step analysis.  
5 The court looks first to what the level of deference should be  
6 to which the plaintiff's choice of forum should be afforded.  
7 It then considers whether there is an adequate alternative  
8 forum. And then it needs to proceed to weigh the relevant  
9 private and public interest factors.

10 Whereas in this case you have a foreign plaintiff, it  
11 is entitled to very little, if any, deference, particularly  
12 because the indicia of forum shopping here are enormous.

13 Turning to the second prong, there is clearly an  
14 adequate forum in Brazil, indeed that's what the parties  
15 selected.

16 Turning next to the private factors, virtually all of  
17 them weigh overwhelmingly, indeed, entirely in favor of Brazil.  
18 They are a major Brazilian company. As the Pinto affidavit  
19 reflects, CNO is a Brazilian company domiciled in Brazil. It  
20 is the largest construction company in Brazil, and the  
21 Odebrecht loop is also a Brazilian business. The project is in  
22 Brazil. Virtually all of the key witnesses are in Brazil.  
23 They point to one witness in New York who was involved in the  
24 original negotiations, but virtually all of the witnesses  
25 involved in the alleged breaches and all of the events relating

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1 to the alleged breaches are in Brazil. Key third parties are  
2 in Brazil.

3 I see nothing in their papers, but if you look at the  
4 Pinto affidavit, he talks about how they believe that a  
5 Brazilian company named Conagra Korea is behind this. They are  
6 in Brazil. Nonparty Brazilian witnesses are not subject to  
7 subpoena. The agreements are governed by Brazilian law. Key  
8 documents regarding the project are in Brazil. You could go on  
9 and on. Every private factor weighs overwhelmingly in favor of  
10 Brazil.

11 When you come to the public interest factors, it is  
12 even more lop-sided. What do they say? Again, I am just  
13 basing it on their papers. They say, first of all, it is clear  
14 this is not a private project. It is a purely Brazilian  
15 project that, according to them, will have a significant impact  
16 on the citizens of Brazil. The Brazilian government has been  
17 and will remain intimately involved in this project which they  
18 say was part of the government plan. So paragraph 4 of the  
19 Pinto affidavit, he says that the project was part of the  
20 economic growth acceleration plan proposed by the Brazilian  
21 government to address Brazil's suspected infrastructure needs  
22 over the next decade.

23 Paragraph 9, he says that the project uses public  
24 lands and waterways and requires a government concession to  
25 operate the resulting power facility. The Brazilian government

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1 required three preliminary studies to be conducted and accepted  
2 by the government before an auction date would be set.

3 As I said before, the Brazilian government is  
4 investigating this.

5 And, finally, when you look at their brief, the entire  
6 public interest argument they make in support of their request  
7 for an injunction is based on the public interest of Brazil and  
8 the people of Brazil whose interests are a matter for the  
9 government of Brazil to protect and, indeed, that's exactly  
10 what the SDE is investigating.

11 And, finally, New York has absolutely no interest in  
12 this thing. So it is hard to imagine a more compelling case  
13 for a forum non conveniens dismissal over and above the forum  
14 selection clause.

15 The bottom line is, your Honor, based on their papers  
16 alone, we believe that they have failed completely to satisfy  
17 any prong, any aspect of the test to obtain a TRO in the Second  
18 Circuit. There is no reason why a New York court should  
19 involve itself in this Brazilian dispute, let alone grant the  
20 kind of extraordinary relief which they seek which could very  
21 well be interfering with an ongoing investigation in Brazil.  
22 We believe that this was a clear misuse of this Court. They  
23 have no risk of irreparable harm. There is no urgency. They  
24 have an adequate remedy of law. There is no probability of  
25 success on the merits because we have made clear, among other

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1 things, that we intend to honor the exclusivity clause. There  
2 is no basis for a TRO here and there is certainly no basis to  
3 allow them to launch into discovery.

4 We believe and we respectfully request that the Court  
5 should deny the application for a TRO and that, either pursuant  
6 to the exclusive forum selection clause or the doctrine of  
7 forum non conveniens, they should dismiss this case and tell  
8 them, if they want to bring a case, they should do so in Brazil  
9 where they have agreed to do so.

10 Thank you, your Honor.

11 THE COURT: All right. Thank you, Mr. Rothman.

12 On the briefs, I know that I will find the real issues  
13 if I look in the itty-bitty footnotes, so I make an exception  
14 to my usual rule that I will not read footnotes that are in  
15 typeface smaller than the typeface of the main brief, though  
16 you are all now on notice that I do not like footnotes and I  
17 will not read itty-bitty footnotes. So I did read the  
18 itty-bitty footnotes, so I think I was able to tease out all of  
19 the issues that Mr. Rothman has called to my attention this  
20 morning, and I would be interested in what you have to say  
21 about those issues, which is not much.

22 MR. VICKERY: Your Honor, you didn't want me to  
23 anticipate all of their arguments, did you?

24 THE COURT: Sure.

25 MR. VICKERY: I would have a hard time with a 50-page

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1 or 100-page brief if I did that.

2 But let me talk about this dispute for a second, which  
3 is basically very narrow. Do they have an enforceable  
4 exclusionary obligation or not? We are not talking about  
5 damages or actions for damages arising out of pursuing other  
6 remedies. We just want to know whether this isolated clause in  
7 that MOM agreement, exclusionary agreement is enforceable.

8 THE COURT: They admit it is enforceable, unless and  
9 until such time -- their lawyer has stood up here and said, it  
10 is enforceable and we intend to abide by it unless and until  
11 such time as the government of Brazil tells us it is not  
12 enforceable. So what do I have to do with any of this?

13 MR. VICKERY: Well, so far so good. And we have asked  
14 them for assurances. What is a breach? Have GE officials been  
15 meeting in Brazil with IESA and Hitachi and planning, if they  
16 have not formally joined the consortium --

17 THE COURT: Why should I care about any of that if  
18 they have said, if a representation has been made to me by an  
19 officer of the court and if letters from General Electric  
20 officials have been sent to your client saying, you know, our  
21 hands are tied, we cannot participate in any other bid unless  
22 and until we get released, and if CNO won't release us and the  
23 Brazilian government doesn't conclude that this is anti-  
24 competitive, we are stuck. Can't do anything.

25 MR. VICKERY: Fine. Make this real.



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1           The bidding process is between the contractor, the  
2 prime contractor. Suppliers are not the main parties of this  
3 bid. Does it mean that they won't support the bid and not give  
4 information and comfort to this other group?

5           THE COURT: Information, go to Sao Paulo to talk about  
6 the information.

7           MR. VICKERY: I agree. The limited disclosure  
8 agreement talks about Sao Paulo and has a damage limitation  
9 but that is strictly non-disclosure. I don't think that they  
10 maintain that the contractual terms, the price for the turbine  
11 would be governed in Sao Paulo unless there is a new --

12           THE COURT: Are you suggesting that the gravamen of  
13 your lawsuit is that they have breached a contract from which  
14 they have withdrawn and withdrew in accordance with its terms,  
15 or maybe you are saying they didn't withdraw in accordance with  
16 the terms? It looks to me like they withdrew in accordance  
17 with its terms, two months after they signed it.

18           MR. VICKERY: That is for example.

19           THE COURT: Let's just deal with reality here instead  
20 of hypotheticals.

21           MR. VICKERY: One is confidentiality. The other is  
22 exclusivity.

23           THE COURT: I absolutely agree. Confidentiality is  
24 none of my business and exclusivity may or may not be my  
25 business.

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1 MR. VICKERY: This is a commonplace. You share with  
2 your competitors, you enter into non-completes --

3 THE COURT: Happens all the time.

4 MR. VICKERY: The disclosure part of the original  
5 agreement says Sao Paulo. That's what it says. This is a  
6 different agreement. This is like, I think, going to a lawyer  
7 giving him secret and he is disqualified from going across the  
8 street. You have to go piecemeal --

9 THE COURT: This is what I need to know, what the MOM  
10 being subject to the exclusivity agreement means because my  
11 instinct as an American lawyer is to say that that imports the  
12 terms of the non-disclosure agreement into the MOM, and it  
13 means that the scribe who was scribbling down this agreement  
14 didn't have to rewrite all of those terms, they just  
15 incorporate them by reference.

16 That, it seems to me, is the most logical reading of  
17 the English words which are the only ones that I can read  
18 because, although I read Spanish, I don't read it well enough  
19 even to read a Spanish contract and Portuguese is enough  
20 different from Spanish that it makes me dizzy.

21 So I appreciate that you have submitted an affidavit  
22 from a Brazilian lawyer which, in my mind raises more questions  
23 than it answers, but right now, you haven't convinced me, and  
24 that as to anything relating to non-disclosure, anything  
25 relating to non-disclosure, the proper forum here is in Sao



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1 Paulo.

2 MR. VICKERY: I want to focus on the other half of  
3 exclusivity. Regardless of secrets, and that I don't think is  
4 subject to any forum selection clause.

5 THE COURT: I tend to agree with you on that.

6 MR. VICKERY: And the reason that we are here is the  
7 intellectual process is centered in this state. You just don't  
8 buy generators off the shelf; you design them for the sort  
9 of --

10 THE COURT: It is centered in the Northern District of  
11 New York. It is not centered here. They are not making  
12 turbines in New York City. General Electric is barely in New  
13 York City. They are on Exit 46 off of Merrick Parkway in  
14 Fairfield, Connecticut, and have been for 20 years and they  
15 have a big plant upstate in Schenectady.

16 MR. VICKERY: They do have an office in New York, so  
17 for purposes of venue, that's enough. It may be a more  
18 convenient place. You can do a 1404 transfer to Schenectady,  
19 but the lawyers are here --

20 THE COURT: Or I can do a FNC to Brazil.

21 MR. VICKERY: That's true.

22 THE COURT: And I am really concerned and I have been  
23 concerned since I started reading papers about some sort of  
24 investigation about what that investigation is. And your  
25 papers don't really tell me what it is or what is going on in

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1 Brazil and how this relates to that Brazilian investigation.

2 MR. VICKERY: I think what is going on in Brazil, to  
3 the extent that I know, is that competitors probably said we  
4 need more time and are objecting to this tying up of this area  
5 due to the consortium, so you go to the government and you  
6 lodge a complaint. The government has written letters.

7 As far as I know, that's all that happened. If there  
8 is a decree that GE is free, despite this enforceable contract,  
9 fine, that's the game. You have an appeal in Brazil. But our  
10 focus here, until the Brazilian government acts, then this is  
11 an enforceable contract and they should stand clear.

12 THE COURT: And they have said that they are standing  
13 clear until somebody releases them, be it your client or the  
14 Brazilian government. They know they can't play. That's what  
15 they said.

16 MR. VICKERY: They have said that, and yet there is a  
17 letter to a pile of ministers saying that we have been working  
18 with them for a year. What does that mean? That is not  
19 standing clear. That is doing everything but put your name on  
20 the contract. Just waiting for the government to possibly  
21 release them.

22 If you look at the declaration, there were scads of  
23 manufacturers of turbines out there. There is Hitachi. There  
24 are Russians. There is Westinghouse. There is Toshiba. There  
25 is not a shortage of turbine manufacturers. One of the

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1 competitors said, we don't care about these things. We have  
2 our own suppliers. So this is people agitating.

3 Of course, GE wants to be in the action now. They  
4 chose to get out and now they want to get back in, and the  
5 government of Brazil wants everybody to play because it will  
6 lower the price. But we have agreement with them which was  
7 negotiated back and forth and they were given a choice, do you  
8 want to play and be a part of our team? Sign this. They  
9 signed it. So it should be enforceable until the government of  
10 Brazil says this violates public policy.

11 And I wouldn't expect you to focus on Brazilian public  
12 policy whether it is antitrust or not. This is exclusivity.  
13 You cannot play with other people, which they acknowledge is  
14 enforceable. And that means that you don't meet with them.  
15 You don't do everything but sign a contract.

16 If they make a representation that they will stand  
17 clear until released by the Brazilian government, I'm sure our  
18 client would accept that and it might make the problem go away.

19 We have sent letters. There were meetings in Brazil  
20 and saying, are you going to honor this, and we have gotten  
21 ambiguous answers, and by filing here you get their attention.  
22 It is quite common that this Court can very quickly look at  
23 this and say, is it enforceable or not. They do it every day.

24 But perhaps if counsel would elaborate a little bit  
25 more about what they will not do -- not meet with competitors,

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1 they will stand clear until released by the action of Brazil  
2 that otherwise they will honor it.

3 THE COURT: Mr. Rothman, I know that you have not had  
4 a lot of opportunity to talk to your client.

5 MR. ROTHMAN: Your Honor, I don't want to make a  
6 representation to the Court that I don't really have enough  
7 facts to make. What I do know is that I am authorized to say,  
8 since this was the question that I asked, that we will not bid  
9 or participate in any bid unless and until the SDE were to  
10 invalidate the agreement. And even in that event, the client  
11 has not made a determination as to what it will do.

12 I should also note that, while Mr. Vickery is making  
13 statements about what the agreement prohibits, that's not  
14 contained in the agreement. The only reference to the  
15 exclusivity is in paragraph 5A which, after saying that it is  
16 subject to the confidentiality agreement says at the end -- I  
17 had better read the whole thing: "This MOM is subject to the  
18 confidentiality agreement signed by the parties and currently  
19 in force. If GE does not enter into the construction  
20 consortium or exit the construction consortium under any  
21 provision of this MOM, then GE shall maintain the  
22 confidentiality agreement until its expiry and further agrees  
23 not to pursue this project with any other party."

24 That's all it says.

25 The prebidding, as we say, is due on September 30. I

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1 gather that the bids are due on October 30. And what I am in a  
2 position to say is that we won't either bid or participate in  
3 any bid for so long as this contract remains in place, your  
4 Honor.

5 THE COURT: Well, of course, "pursue" is a little  
6 broader word than "bid" as you know and I know.

7 MR. ROTHMAN: I am not purporting to say what it  
8 includes or it doesn't include. Is it ambiguous, is it not  
9 ambiguous. But what I am saying is, that's the representation  
10 that we can make.

11 By the way, I think if you look at their papers, they  
12 did not ask us the question, will you honor the exclusivity  
13 provision. If you look at the letter that they refuse to grant  
14 us the waiver that was requested. They refuse to release us.  
15 Why? Because they were concerned about the confidentiality  
16 agreement and the confidential information, but they never  
17 asked us the simple question. Had they asked us the simple  
18 question, we probably wouldn't be here.

19 THE COURT: I am not going to grant the TRO because I  
20 think there are enough open questions, including whether I have  
21 jurisdiction over what appears to be significant portions, if  
22 not all of this lawsuit. And to the extent that I have  
23 jurisdiction, whether it is appropriate in all of the  
24 circumstances, all of which are not before me, then I exercise  
25 that jurisdiction.

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1           Also, to the extent that on the present record I  
2 believe I might have jurisdiction, it is exclusively over the  
3 exclusivity portion of the agreement. And at the present time  
4 on the present record, it does not appear to me that there is  
5 enough of a risk of irreparable harm, since GE has represented  
6 that it is not going to be participating in any bidding.

7           I realize that the words "not pursuing the project  
8 with other parties" isn't limited to bidding and for all I  
9 know -- and I don't know enough yet -- GE may have participated  
10 or pursued the project with another party and that may have  
11 involved breaching of the confidentiality agreement which is,  
12 of course as I read the contract today, the province of the  
13 court in Sao Paulo. But there, frankly, are enough questions  
14 about whether this Court is going to go forward with this case  
15 that it would be inappropriate for me to enter a TRO at this  
16 time.

17           So the question is, how we are going to proceed, and  
18 we are obviously going to proceed very quickly. I am not, Mr.  
19 Rothman, going to dismiss the case on forum non conveniens  
20 grounds sua sponte. I am prepared to entertain an immediate  
21 motion followed by an immediate response, and I am talking 48  
22 hours. You apparently have some advantages since you just  
23 briefed this issue.

24           The disadvantage that you have is that you really need  
25 to get some information from your client and from the Brazilian



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1 government pretty quickly about what this investigation  
2 involves and what it is all about and what it could result in.

3 I don't know how much the Brazilian government is  
4 willing to share with an American court, but I am not  
5 interested in stepping on the toes of the Brazilian government  
6 and would certainly be interested to know what they are about  
7 and how quickly they are likely to resolve this matter.

8 So I know that there is going to be a motion to  
9 dismiss. As much as I would like to, I am not going to send  
10 the case to Schenectady. They are busy enough up there, and  
11 they don't have judges and we have plenty of judges, and I am  
12 here. And I don't deny that there is venue over General  
13 Electric, at least some General Electrics in this district.  
14 There may not be venue over all of the General Electrics in  
15 this district.

16 I would think, Mr. Vickery, you have a pretty tough  
17 row to hoe to try to pierce the corporate veil of the great GE  
18 infrastructure. They have a pretty fine legal department that  
19 I am sure spends an awful lot of time making sure that they  
20 observe corporate formalities so that that corporate veil can't  
21 be pierced.

22 I don't know who all of these people are. I notice  
23 that General Electric Brazil, there appears to be a company  
24 called General Electric Brazil. The fellow besides  
25 Mr. Weinstein who was involved in these negotiations, Luis

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1 somebody or other, was a representative of the GE Brazil and I  
2 know they are not named as a party and the joint venture  
3 company is not named as a defendant. That is a Brazilian  
4 enterprise.

5 And as I said, I have some question about exactly who  
6 the parties to the MOM are. And in that regard there is  
7 actually an interesting phrase used in the MOM, which I don't  
8 know how literally to take, and it is in paragraph 5A. And it  
9 talks about the MOM being subject to the confidentiality  
10 agreement signed by "the parties" and currently in force, which  
11 could be read to suggest that the parties to the MOM are the  
12 parties to the exclusivity agreement. And if that's true, then  
13 they have the wrong people here.

14 So aside from the underlying merits of whether there  
15 is an enforceable exclusivity agreement, which doesn't seem to  
16 be disputed, we have a lot of issues here to get out of the way  
17 about whether this Court should be handling this case.

18 So, Mr. Rothman, tell me what is realistic. Can you  
19 get your motion made by Monday?

20 MR. ROTHMAN: Close of the day on Monday?

21 THE COURT: Close of the day on Monday.

22 MR. ROTHMAN: Let me make sure I understand what we  
23 should be briefing. Should I just brief the 409 motion?

24 THE COURT: Anything that is going to get rid of the  
25 case for me.

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1 MR. ROTHMAN: In other words, just so that I  
2 understand, don't worry about the injunction issues now, worry  
3 about the issues that go to whether this Court should handle  
4 this case?

5 THE COURT: Right.

6 Close of business, Wednesday, Mr. Vickery?

7 MR. VICKERY: Your Honor, I am not quite the same  
8 expert on forum non conveniens that Mr. Rothman is and other  
9 issues --

10 THE COURT: But you can start to research now.

11 MR. ROTHMAN: I was settling in for the holiday last  
12 night, and not that I am very observant but I was settling in.  
13 If you would like to do this on a slightly relaxed schedule I  
14 am certainly amenable.

15 MR. VICKERY: I am amenable. They have to figure out  
16 what the Brazilian government is doing. They are slow --

17 THE COURT: If you want to work out a schedule that  
18 would be fine with me, but I am setting two of my three law  
19 clerks, one of whom is home for the holidays to work  
20 immediately so that I can turn this around in 24 to 48 hours on  
21 those issues, real fast. Real fast. But I really think that I  
22 have to decide first and foremost whether this case belongs in  
23 front of me.

24 MR. ROTHMAN: I agree.

25 MR. VICKERY: I would ask, if I can, for a little more

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1 time because getting information from Brazil --

2 THE COURT: In that case, you and Mr. Rothman work out  
3 a schedule in time for him to get home for Rosh Hashanah.

4 MR. ROTHMAN: We will do it.

5 THE COURT: If you would communicate with Mr. O'Neill.

6 THE DEPUTY CLERK: 805-6329.

7 THE COURT: We still have a 212 number here.

8 MR. VICKERY: There is one issue about sealing of the  
9 declaration and this MOM agreement which has details of theirs  
10 and ours. Could we agree on having that exhibit and the  
11 declaration filed under seal?

12 MR. ROTHMAN: Sure. I have no problem with that. We  
13 have given it to our client.

14 THE COURT: They have to give it to their clients.

15 Knowing that you have made that recommendation, that  
16 is one of the reason that I made sure that I went through all  
17 of the exhibits with a fine tooth comb, and I would have to  
18 say, except for the MOM itself, I don't really see anything in  
19 there that contains what would arguably be called  
20 confidentiality information.

21 For the time being, I am prepared to seal Mr. Pinto's  
22 affidavit, but that is subject to my reading it again because I  
23 am an anti-sealer and I really don't think that there is much,  
24 except in the MOM. I agree with you that in the MOM there is  
25 some stuff that ought not to be made public. But other than

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1 that, these letters in Pinto's affidavit he says that the  
2 various proposals that your client has been making and the  
3 studies have been public in Brazil for years. The letters that  
4 have gone back and forth between your clients to the ministry  
5 doesn't contain the confidential information. They contain the  
6 various provisions on who is subject to what.

7 So I will enter an interim order sealing the Pinto  
8 affidavit and its exhibits, but that may very quickly be  
9 modified to just sealing Exhibit C.

10 MR. VICKERY: Thank you, your Honor.

11 MR. ROTHMAN: Thank you, your Honor.

12 THE COURT: So we will get a call.

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